No. 00-6479-CSY Title: Stanley Durden, Petitioner
v.
California

Docketed: October 10, 2000 Court: Court of Appeal of California, Second Appellate District

| Entry | Date | Proceedings and Orders |
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| | Oct 10 2000 | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 9, 2000) |
| | Oct 30 2000 | Waiver of right of respondent California to respond filed. |
| | Nov 9 2000 | DISTRIBUTED for Conference of November 22, 2000 |
| | Nov 16 2000 | Response requested. |
| | Dec 18 2000 | Brief of respondent California in opposition filed. |
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| | Feb 20 2001 | Petition DENIED. Dissenting opinion by Justice Souter with whom Justice Breyer joins. (Detached opinion.) |

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No. 00-6479

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In the

Supreme Court of the United States

October Term 2000

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STANLEY DURDEN,
Petitioner

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent

---

On Petition for a Writ of Certiorari
to the Court of Appeal of California, Second Appellate District,
Division Five

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether it is "grossly disproportionate" and thus cruel and unusual punishment in violation of the Eighth Amendment to sentence a homeless man to 25 years to life in prison for the crime of petty theft when the crime consisted of stealing an umbrella and two bottles of liquor worth under $43 on a cold and rainy night.

2. Whether it is "grossly disproportionate" in violation of the Eighth Amendment to treat misdemeanor conduct as a felony because of prior offenses and then to use that enhanced misdemeanor as a third felony strike that is the basis for imposing a sentence of 25 years to life in prison.



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## PETITION FOR A WRIT OF CERTIORARI

Stanley Durden petitions for a writ of certiorari to review the judgment of the Court of Appeal of California, Second Appellate District, Division Five.

## OPINIONS BELOW

The decision of the California Court of Appeal in People v. Durden was entered April 17, 2000, and is unpublished. It is included here as Appendix A. The Supreme Court of California denied the petition for review on July 12, 2000. That order is included here as Appendix B.

## JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, not cruel and unusual punishments inflicted."



## STATEMENT OF THE CASE

The petitioner, Stanley Durden, was a homeless man convicted for stealing an umbrella and two bottles of liquor from a supermarket on a cold and rainy December night. The aggregate retail value of the merchandise was less than $43. Under California law, this generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. California Penal Code Ann. §490 (West Supp. 1998).

California law, however, provides that petty theft with a prior conviction is a felony offense. California Penal Code Ann. §666. Because Durden had at least two prior convictions, his petty theft was prosecuted and convicted as a felony. Durden's prior convictions all were relatively minor and all a decade ago or longer. The prior convictions listed in the information as justifying the application of California's "three strikes" law were for robbery or attempted robbery, the most recent being in 1989. (C.T. 12).

Moreover, under California's "three strikes" law, this felony, though based on misdemeanor conduct, was the basis for imposing a punishment of 25 years to life in prison. California Penal Code Ann. §667(e)(2)(A). Durden is now serving this life sentence in California prison, notwithstanding a recommendation from the probation officer that the sentence be a year imprisonment.

## REASONS FOR GRANTING THE PETITION

THE SUPREME COURT SHOULD GRANT CERTIORARI TO RESOLVE THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER IT IS "GROSSLY DISPROPORTIONATE" IN VIOLATION OF THE EIGHTH AMENDMENT FOR A CRIMINAL DEFENDANT TO BE SENTENCED TO 25 YEARS TO LIFE IN PRISON FOR PETTY THEFT, CONDUCT THAT IS GENERALLY REGARDED AS A MISDEMEANOR OFFENSE UNDER STATE LAW

### A. Grossly Disproportionate Punishments Violate the Cruel and Unusual Punishment Clause of the Eighth Amendment

In Weems v. United States, 217 U.S. 349, 371 (1910), this Court held that the Eighth Amendment prohibits "greatly disproportioned" sentences. On many other occasions, this Court has declared sentences unconstitutional as being "grossly disproportionate." For example, in Coker v. Georgia, 433 U.S. 584, 592 (1977), the Court held that "a sentence of death is grossly disproportionate and excessive for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." In Solem v. Helm, 463 U.S. 277 (1983), the Court held that it was grossly disproportionate to sentence a person to life imprisonment for passing a bad check for $100 because of six prior non-violent offenses. Justice Powell, writing for the Court, observed that "the Court has continued to recognize that the Eighth Amendment prohibits grossly disproportionate punishments." Id. at 288 (citations omitted).

In Harmelin v. Michigan, 501 U.S. 957 (1991), seven Justices



expressly recognized that grossly disproportionate sentences are unconstitutional. In Harmelin, Justice Scalia argued that the Eighth Amendment does not prohibit disproportionate sentences. Id. at 985. However, only Chief Justice Rehnquist joined this part of Justice Scalia's opinion.

Justice Kennedy, concurring in part and concurring in the judgment, expressly disagreed with Justice Scalia, and declared: "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly' disproportionate to the crime." Id. at 1001 (Kennedy, J., concurring in part and concurring in the judgment). Justices O'Connor and Souter joined this opinion and its conclusion that grossly disproportionate punishments are unconstitutional. The four dissenting Justices in Harmelin, actually the plurality in the case, argued that the Eighth Amendment prohibits disproportionate sentences and contended that "gross disproportionality" was too restrictive a constitutional standard. Id. at 1009, 1012 (White, J., dissenting); id. at 1027 (Marshall, J., dissenting).

No decision since Harmelin has questioned the principle established by almost a century of Eighth Amendment decisions: grossly disproportionate punishments are cruel and unusual punishment in violation of the Eighth Amendment. In fact, in United States v. Bajakajian, 524 U.S. 321, 336 (1998), the Court, in invalidating a forfeiture as violating the Eighth Amendment, stated: "[W]e therefore adopt the standard of gross

disproportionality articulated in our Cruel and Unusual Punishments Clauses precedents."

B. The Court Should Grant Review to Decide Whether the Imposition of a Punishment of 25 Years to Life in Prison is "Grossly Disproportionate" When, as Here, it is Imposed for Conduct that Generally Would be Regarded as a Misdemeanor

This Court has stated that proportionality is to be determined by "objective factors to the maximum extent possible." Rummel v. Estelle, 445 U.S. 263, 274-275 (1980). In Solem v. Helm, 463 U.S. 277 (1983), the Court stated such objective criteria: "[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."

Under these criteria, Durden's sentence was grossly disproportionate to the offense. The offense was minor, petty theft, but the punishment was enormous: a sentence of 25 years to life in prison. Under California law, this is deemed to be a life sentence. In re Lynch, 8 Cal.3d 410, 415-416 (1972). The probation officer, a government official charged with recommending the appropriate punishment, thought that the appropriate punishment for Durden would be a sentence of a year in prison. Also, and quite importantly, as Justice Stevens



recently noted: California is the "only state in the country in which a misdemeanor could receive such a severe sentence." Riggs v. California, 525 U.S. 1114 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari).

Simply put, the sentence imposed on Durden was both cruel and unusual. A punishment of 25 years to life in prison is cruel when inflicted for committing a misdemeanor. The Court has explained that "courts are competent to judge the gravity of an offense, at least on a relative scale." Solem v. Helm, 463 U.S. at 292. Thus, the Court noted that "[t]he absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars -- a point recognized in statutes distinguishing petty theft from grand theft." Id. at 293. In Solem, the Court concluded that it was cruel and unusual punishment to impose a life sentence for uttering a "no account" check of $100. Durden was sentenced to life imprisonment for stealing $43 of merchandise.

The punishment is unusual because California is the only state in which misdemeanor conduct can be the basis for a sentence of 25 years to life in prison. This Court has noted that "courts properly may look to other jurisdictions in deciding where lines between sentences should be drawn." Id. at 295.

The California Court of Appeal affirmed Durden's sentence and declared: "In short, defendant has not been sentenced to life in prison merely because he was convicted of petty theft with a prior conviction. Rather, he was so sentenced because he

is a serious career criminal who has demonstrated repeatedly that he has no intention of abiding by the laws of the state." People v. Durden, (Cal.Ct.App. 2000) (unpublished disposition), at 8. The court relied expressly on similar language in this Court's decision in Rummel v. Estelle, 445 U.S. at 278.

Although generally the government may punish recidivist conduct harshly, there are several reasons why this argument is flawed as applied here, why Rummel is distinguishable, and why this Court should grant review to determine the meaning of the Eighth Amendment in this context. First, California essentially "double counts" the prior offenses. Because of his prior offenses, Durden's misdemeanor conduct, petty theft, is converted by statute into a felony, "petty theft with a prior conviction." California Penal Code Ann. §666. Then that felony is used to impose a sentence of 25 years to life in prison. In other words, the prior offenses are used twice: first to convert a misdemeanor into a felony and then to impose a life sentence based on it being a felony.

States can punish recidivists more harshly, but there is a limit. In Rummel v. Estelle, the Court expressed the need for great deference to legislative choices regarding punishments for recidivists, but stated: "This is not to say that a proportionality principle would not come into play in [an] extreme example . . ., if a legislature made overtime parking a felony punishable by life imprisonment." 445 U.S. at 274 n.11. Yet, that is exactly what California does through its double



counting; a misdemeanor is deemed a felony because of the prior offenses and then as enhanced, the relatively trivial conduct, a homeless man stealing $43 worth of merchandise to keep warm on a cold and rainy night, becomes the basis for a sentence of 25 years to life imprisonment.

Second, this Court never has approved such harsh sentences for misdemeanor conduct, even when the offender is a recidivist. The distinction between misdemeanors and felonies is deeply embedded in the law. This Court recently recognized the fundamental historical difference between felony and misdemeanor conduct. In Apprendi v. New Jersey, 120 S.Ct. 2348, 2357 n.7 (2000), the Court observed that "[t]he common law punishment for misdemeanors -- those smaller faults, and omissions of less consequence" did not include prison sentences. The Court stated that "[a]ctual sentences of imprisonment for such offenses, however, were rare at common law until the 18th century for 'the idea of prison as a punishment would have seemed an absurd expense.'" Id. at 2357 n.7 (citations omitted). See also Lewis v. United States, 518 U.S. 322, 328 (1996) (drawing distinction between petty offenses and felonies for purpose of trial by jury under the Sixth Amendment); Felix Frankfurter & Thomas G. Corcoran, Petty Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917 (1926) (describing the historic distinction between felonies and petty offenses).

In Rummel v. Estelle, this Court repeatedly emphasized that it was considering permissible punishment for felony conduct.

See 445 U.S. at 274, 278, 284. In fact, the Court stressed the "line dividing felony theft from petty larceny." Id. at 284. Rummel involved felony theft, while this case concerns what California deems to be petty theft.

Justice Stevens recently explained the importance of this distinction: "While this Court has traditionally accorded to state legislatures considerable (but not unlimited deference) to determine the length of sentences 'for crimes concededly classified and classifiable as felonies,' petty theft does not fall into that category." Riggs v. California, 525 U.S. at 1114 (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari). Indeed, Justice Stevens said that punishing petty theft with a prior conviction by imposing a life sentence is closely analogous to the punishment declared unconstitutional in Solem: "[P]etty theft has many characteristics in common with the crime for which we invalidated a life sentence in Solem, uttering a 'no account' check for $100. 'It involves neither violence nor (the) threat of violence to any person'; the amount of money involved is relatively small; and the State treats the crime as a felony (here, only under some circumstances) pursuant to a quirk in state law." Id. at 1114 (citations omitted).

In Harmelin v. Michigan, Justice Scalia, joined only by Chief Justice Rehnquist, recognized the possibility of "extreme examples" of very harsh punishments for relatively trivial offenses, but said that "they are certain never to occur." 501 U.S. at 985-986. But that is exactly what occurred in this case:



a homeless man was sentenced to 25 years to life imprisonment for petty theft, stealing an umbrella and two bottles of liquor on a cold and rainy December night.

Third, unlike Rummel, in California, there is tremendous variation in the use of the "three strikes" law based on the county in which a person commits the crime. For example, because of different attitudes of local district attorneys, the three strikes law is applied in Los Angeles and Sacramento counties seven times more often than in Alameda and San Francisco counties. See Mike Males, "Striking Out: The Failure of California's 'Three Strikes and You're Out' Law," 11 Stan. L. & Pol'y Rev. 65, 68 (1999). See also Samara Marion, "Justice By Geography? A Study of San Diego County's Three Strikes Sentencing Practices from July-December 1996," 11 Stan. L. & Pol'y Rev. 29 (1999). This tremendous geographic variance makes this situation much different from Rummel.

This Court should grant review to determine the issue recognized by Justice Stevens in Riggs: does California's unique sentencing scheme violate the Eighth Amendment by converting a misdemeanor to a felony and then using that felony as the basis for imposing a sentence of 25 years to life imprisonment? Is imposing this punishment for stealing $43 worth of merchandise "grossly excessive" in violation of the cruel and unusual punishment clause of the Eighth Amendment?

C. The Court Should Grant Review to Decide this Important Question that Affects Hundreds of Prisoners in California and Will Not Be Resolved in Any Other Manner

These issues were presented for this Court to consider in a petition for certiorari in Riggs v. California, 525 U.S. 1114 (1999). Riggs involved a homeless man who was sentenced to 25 years to life imprisonment for stealing a bottle of vitamins from a supermarket. The Court denied certiorari, with only Justice Breyer dissenting. However, Justice Stevens wrote an opinion respecting the denial of the petition for a writ of certiorari, which was joined by Justices Souter and Ginsburg. Justice Stevens began by noting that "[t]he pro se petition for certiorari raises a serious question concerning the application of California's 'three strikes' law to petty offenses." Id.

Justice Stevens stated that he agreed to the denial of certiorari because "[i]t is prudent for this Court to await review by other courts before addressing the issue." Id. Now, almost two years later, it is clear that such review will not be forthcoming. The California Supreme court repeatedly has denied review of this issue, as it did in this case.

Moreover, habeas corpus review is not possible. Durden urges this Court to find that imposing a sentence of 25 years to life imprisonment for misdemeanor conduct is "grossly disproportionate" and cruel and unusual punishment. Arguably, this would be a "new rule" of constitutional law and not able to



be raised in a habeas corpus petition. See Teague v. Lane, 489 U.S. 288 (1989).

Also, the United States Court of Appeals for the Ninth Circuit has ruled that "as long as the sentence imposed on the defendant does not exceed statutory limits, we will not overturn it on Eighth Amendment grounds." Windham v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998). This forecloses use of habeas corpus to challenge the constitutionality of California's imposition of life sentences for misdemeanor conduct because they are within the statutory limits. Indeed, federal district courts in California have dismissed habeas corpus petitions challenging California's "three strikes" law as constituting cruel and unusual punishment. See, e.g., Gamble v. Pliler, 2000 WL 126125 (N.D. Cal. 2000); White v. Galaza, 2000 WL 630861 (N.D. Cal. 2000); Lopez v. Ryan, 2000 WL 709491 (N.D. Cal. 2000); Wallace v. Castro, 2000 WL 1262662 (N.D. Cal. 2000).

According to the most recent statistics published by the California Department of Corrections, 319 people are serving sentences of 25 years to life for having committed the crime of petty theft with a prior conviction. "Third Strike Cases by Offense Group," Department of Corrections, State of California, August 14, 2000. Thus, it is imperative for this Court to decide whether it is cruel and unusual punishment to impose a life sentence for misdemeanor conduct.

D. The Court Should Grant Review to Resolve a Split Among the State Courts as to Whether it is Unconstitutional to Impose a Life Sentence for Misdemeanor Conduct

There is currently a disagreement among the state courts as to whether it violates the Eighth Amendment to impose a life sentence in these circumstances. For example, in People v. Gaskins, 923 F.2d 292 (Colo. App. 1996), the Colorado court found that it violates the United States Constitution to impose a life sentence for misdemeanor conduct, even if there have been prior felony convictions. The California Court of Appeal, in this case, interpreted the Eighth Amendment differently and upheld the life sentence. This Court should grant review to resolve the conflict among the state courts on this important issue of United States constitutional law.



CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

STANLEY DURDEN,

Defendant and Appellant.

B132255

(Los Angeles County
Super. Ct. No. KA043377)

COURT OF APPEAL - SECOND DIST.
FILED
APR 17 2000
JOSEPH A. LANE Clerk
Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Clifton L. Allen, Judge. Affirmed.

Stuart Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Linda C. Johnson and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Stanley Durden appeals from a judgment following a jury trial in which he was convicted of petty theft with a prior theft conviction (Pen. Code, § 666) and four prior serious felony conviction allegations were found to be true (Pen. Code, § 1170.12). He was sentenced to state prison for 25 years to life. Defendant contends: the trial court erred by failing to inquire concerning his *Marsden*[1] and new trial motion; the trial court abused its discretion by failing to strike three of his four prior serious felony convictions; and his sentence constitutes cruel and unusual punishment. We affirm.

## FACTS

At approximately 8:20 p.m. on January 25, 1999, defendant entered a Lucky's supermarket in Diamond Bar. He stole two bottles of liquor and an umbrella worth a total of less than $50 and left the market. Outside the market, a store theft prevention officer approached him. Defendant shoved the officer. A second store theft prevention officer intervened. Defendant struggled by kicking and flailing his arms. He was eventually subdued and arrested.

## DISCUSSION

### *Marsden* and New Trial Motion

At defendant's request, the trial was not bifurcated. On the day of trial, defense counsel requested that the trial court review the strike priors to determine their constitutionality prior to the determination of guilt. Defense counsel indicated he was making the motion at defendant's request and insistence. Defense counsel further

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1 *People v. Marsden* (1970) 2 Cal.3d 118, 123.

indicated that it was defendant's belief he had not knowingly and intelligently waived his constitutional rights with respect to the pleas entered as to the priors and he had not been advised of the possibility of a 25-year-to-life sentence. No written motion had been filed. The trial court stated that a written motion must be filed and the motion would be decided after the determination of guilt.

The jury convicted defendant of petty theft with a prior theft conviction and found four prior serious felony conviction allegations to be true. Defense counsel filed a written motion requesting the trial court exercise its discretion to strike three of the four prior serious felony convictions. At the conclusion of the argument on sentencing, defense counsel told the trial court he would like to present argument on two other issues. Defense counsel stated: "Finally, Your Honor, my client has asked me to make a motion on his behalf. I do not join in this matter. [¶] If I can read this briefly. The motion reads -- and I'll file this with the court's clerk --. [¶] 'That on or about April 28th, 1999, I, Stanley Durden, was in this court and misrepresented by the public defender, Mr. Whitenhill. The Public Defender Whitenhill did not file any motion to fight my priors . . . and/or strikes. [¶] And further, the D.A. [has] and is using invalid prior convictions. Even further, I was not advised of a right of a jury trial against self-incrimination and the right to confront the witnesses against me. All is being held in violation of the 14th Amendment equal protection of the Constitution. [¶] One, I didn't have a 402 hearing or evidence; two, I don't read or write too well. Three, I didn't know what a 969 motion package is; and [four], before I'm sentenced today, I ask the court to hear my plea for a new trial.' [¶] As to the new trial issue, Your Honor, I would join on that issue. [¶] Thank you, Your Honor. Nothing further on this point."[2]

---

[2] Defendant's handwritten motion was filed with the clerk after the sentencing hearing and was entitled: "A Motion of a Urgent Need of a Court Appointed Attorney Misrepresentation of Counsel Comes Now before this Honorable Court house Judge."



The trial court refused the request to strike any of the prior serious felony convictions and sentenced defendant to state prison for 25 years to life. The motion for new trial was denied.

Defendant contends the trial court failed to make the proper inquiry into his *Marsden* motion. He argues the trial court was required to inquire concerning his dissatisfaction with defense counsel in order to determine whether a new attorney should be appointed to represent defendant on a motion for new trial. We conclude defendant's written motion orally set forth by defense counsel adequately apprised the trial court of the reasons for defendant's dissatisfaction and no further inquiry was necessary.

"'"When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. . . ."' [Citation.]" (*People v. Leonard* (Feb. 28, 2000, C027404) __ Cal.App.4th __ [2000 Daily Journal D.A.R. 2179, 2181].) "*Marsden* explains that 'the trial judge cannot thoughtfully exercise its discretion in this matter without listening to [defendant's] reasons for requesting a change of attorneys.'" (*Ibid.*) "'Failure to inquire adequately into a defendant's complaints results "in a silent record making intelligent appellate review of defendant's charges impossible." [Citation.]'" (*Ibid.*) "[U]nder circumstances in which a defendant has set forth in a 'self-contained document' in sufficient detail the basis for his dissatisfaction with appointed counsel, . . . a 'full-blown hearing' on the alleged inadequate representation is not required." (*People v. Horton* (1995) 11 Cal.4th 1068, 1103; *People v. Freeman* (1994) 8 Cal.4th 450, 481; *People v. Wharton* (1991) 53 Cal.3d 522, 580.)

In this case, it may not have been apparent to the trial court that defendant was making a *Marsden* motion as opposed to a new trial motion. A defendant is required to give some "'clear indication'" that he or she wants a substitute attorney. (*People v. Freeman, supra,* 8 Cal.4th at pp. 480-481.) The title of the motion was not read to the trial court and the body of the motion simply refers to "misrepresentation" and does not

request the appointment of new counsel. The body of the motion asks for a new trial on the grounds: (1) defense counsel failed to make a motion contesting the constitutionality of the pleas in the prior convictions; (2) the prior convictions were constitutionally invalid; (3) he should have received an Evidence Code section 402 hearing; and (4) he had been unaware of the nature of a Penal Code section 969b priors package. Defendant did not orally request appointment of a new attorney and said nothing at the sentencing hearing indicating he was dissatisfied with defense counsel.

Moreover, it is apparent that defendant's dissatisfaction with defense counsel related solely to the prior convictions. It is also apparent from the record that defendant believed his priors were unconstitutional, while defense counsel did not. From the outset, defense counsel made it clear that the motion concerning the constitutionality of the priors was being made at his client's insistence. One of the bases of any such motion was clearly untenable in that there is no requirement a defendant entering a plea of guilty or no contest be advised of future consequences of the plea relating to recidivism. As to any other grounds, defense counsel apparently deliberately provided no reporter's transcripts and did not make a written motion when given the opportunity to do so. These failures do not appear to have been unintentional. The issue was squarely presented on the record. The trial court could certainly have recognized defense counsel's reluctance to raise the issue.

We are unpersuaded by defendant's arguments on appeal that the dissatisfaction with counsel arose from issues arising at the guilt portion of the trial, such as the failure to make a motion to suppress defendant's statement to the police, the failure to adequately cross-examine the store loss prevention officer, and the failure to object to prosecutorial misconduct. Defendant's dissatisfaction from the outset was as to the prior convictions. Defense counsel had made every effort with the prosecution and the trial court to have this case treated as a second rather than a third strike. He was unsuccessful. Defense counsel, however, did not challenge the constitutionality of the priors, although



he was well aware of the issue and its importance. Nothing in the record suggests that defense counsel's evaluation was incorrect.

We conclude, to the extent defendant requested the appointment of new counsel, he adequately explained the reasons for his dissatisfaction in the written motion, and the trial court did not abuse its discretion under these circumstances by failing to inquire further or appoint a new attorney.

**Abuse of Discretion**

Defendant contends the trial court abused its discretion when it refused to strike three of his four prior serious felony convictions to enable him to obtain a second strike sentence rather than a third strike sentence. We disagree.

Defendant has a lengthy criminal record spanning 20 years and including four serious felony convictions. Defendant's criminal record is as follows: 1978 attempted robbery, two years state prison; 1980 attempted robbery, probation, probation revoked, two years state prison; 1982 second degree burglary, two years state prison; 1985 robbery, three years state prison; 1987 grand theft person, sixteen months state prison; 1989 robbery, ten years state prison, parole revoked; and 1997 under the influence of a controlled substance, probation and jail. Moreover, the instant offense involved the theft of alcohol and violent behavior on the part of defendant when he was apprehended by store loss prevention officers.

We find no abuse of discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 162; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) Defendant's longstanding disability did not require the trial court to strike three prior serious felony convictions, which had also been committed while defendant suffered from the same disability. We note that the record does not support defendant's assertion that the trial court did not review the probation report.

**Cruel and Unusual Punishment**

Defendant contends his sentence constitutes cruel and unusual punishment under the California and United States Constitutions. (Cal. Const., art. I, § 17; U.S. Const., 8th Amend.)

A defendant must overcome a considerable burden in a challenge under the cruel and unusual punishment provision of the California Constitution. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.) "A punishment may violate the California Constitution although not 'cruel or unusual' in its method, if 'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (*In re Lynch* (1972) 8 Cal.3d 410, 424.) The *Lynch* court identified three techniques courts used to administer this rule. First, they examined the nature of the offense and the offender. [Citation.] Second, they compared the punishment with the penalty for more serious crimes in the same jurisdiction. [Citation.] Third, they compared the punishment to the penalty for the same offense in different jurisdictions." (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.)

However, a determination can properly be made based on the first *Lynch* factor alone.[3] (*People v. Weddle, supra,* 1 Cal.App.4th at p. 1197.) The focus on the offense

---

[3] Defendant's claim under the federal Constitution can also be analyzed under a single factor. In *Solem v. Helm* (1983) 463 U.S. 277, a majority of the Supreme Court concluded a similar three-part test should govern analysis of federal cruel and unusual punishment claims. It focused on "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." (*Id.* at p. 292.) However, this test did not retain the support of a majority of the court in *Harmelin v. Michigan* (1991) 501 U.S. 957. Justice Scalia, joined by Chief Justice Rehnquist, concluded *Solem* was wrongly decided and that the Eighth Amendment does not guarantee proportionality of sentences. (*Id.* at p. 965.) Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the Eighth Amendment prohibits only sentences which are "grossly disproportionate" to the crime. (*Id.* at p. 1001.) These three justices concluded that consideration of the second and third *Solem* factors is necessary only when the first factor suggests the sentence may be grossly disproportionate. When



considers the crime both in the abstract and in view of the totality of the circumstances surrounding its commission, including such factors as motive, the manner in which the crime was committed, the extent of defendant's involvement, and the consequences of the acts. (*Ibid.*) The focus on the offender considers factors such as defendant's age, prior criminality, personal characteristics, and state of mind. (*Id.* at p. 1198.)

In this case, defendant has failed to show that his sentence is grossly disproportionate to the crime committed. The trial judge in this case carried out the express intent of the Legislature, punishing defendant not merely for his current felonies but also for his recidivism. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823-825.) As previously indicated, defendant's criminal record was lengthy and serious. "One in [defendant's] position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail. [A recidivism statute] thus is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole." (*Rummel v. Estelle* (1980) 445 U.S. 263, 278.)

In short, defendant has not been sentenced to life in prison merely because he was convicted of petty theft with a prior theft conviction. Rather, he was so sentenced because he is a serious career criminal who has demonstrated repeatedly that he has no intention of abiding by the laws of this State. Defendant's sentence is not so disproportionate to his crime that it shocks the conscience and offends fundamental notions of human dignity. Accordingly, this sentence does not violate the prohibition against cruel and unusual punishment.

---

the first factor shows the sentence is constitutional, the analysis is complete. (*Id.* at p. 1005.) Since three justices would uphold a sentence satisfying the first factor, and two justices would uphold a sentence against any proportionality challenge, it is clear that a majority of the Supreme Court would agree that a sentence is constitutional if it does not appear to be grossly disproportionate based on an analysis of the gravity of the offense and harshness of the penalty alone.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P.J.

GODOY PEREZ, J.



APPENDIX B

Court of Appeal, Second Appellate District, Division Five - No. B132255
**S088728**

# IN THE SUPREME COURT OF CALIFORNIA

EN BANC

THE PEOPLE, Respondent,

v.

STANLEY DURDEN, Appellant.

SUPREME COURT
FILED
JUL 12 2000
Frederick K. Ohlrich Clerk
DEPUTY

Petition for review DENIED.

GEORGE

Chief Justice

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
ORIGINAL
DEC 18 2000
CLERK

No. 00-6479

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

**STANLEY DURDEN,** *Petitioner,*

v.

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether sentencing a career criminal recidivist to a term of twenty-five-years-to-life in state prison for the felony crime of petty theft with a prior conviction constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution

Respondent People of the State of California respectfully oppose the Petition For a Writ of Certiorari filed by Petitioner herein.



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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000
No. 00-6479

**STANLEY DURDEN, Petitioner,**

*Petitioner,*

v.

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

*Respondent.*

Respondent People of the State of California respectfully oppose the Petition For a Writ of Certiorari filed by Petitioner herein.

**CONSTITUTIONS, STATUTES OR REGULATIONS**

The Eighth Amendment to the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**STATUTORY PROVISIONS INVOLVED**

California Penal Code section 1170.12(a) through (d) provides:

> (a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more



> prior felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:
>
> (1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.
>
> (2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.
>
> (3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.
>
> (4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.
>
> (5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.
>
> (6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.
>
> (7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.
>
> (8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.
>
> (b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:
>
> (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall

affect the determination that a prior conviction is a prior felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is

(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in this subdivision as a felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three times the term otherwise provided as punishment for each current felony conviction



subsequent to the two or more prior felony convictions, or

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d)(1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.[1]

California Penal Code section 666 provides:

> Every person who, having been convicted of petit theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petit theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

---

1. California Penal Code section 667(a) through (d) is analogous. That section, also known as California's "Three Strikes Law," became effective March 7, 1994. Respondent's Brief in Opposition focuses primarily on the Three Strikes initiative (section 1170.12), enacted in November 1994, because it is the more recent of California's two Three Strikes laws.

## STATEMENT OF THE CASE

In an information filed by the Los Angeles County District Attorney, Petitioner was charged with petty theft with prior convictions in violation of California Penal Code[2] section 666, a felony. The information further alleged that Petitioner incurred four prior serious felony convictions within the meaning of Penal Code sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i). (CT 11-12.)[3]

Petitioner pled not guilty and denied the special allegations. (CT 13.) The court, both prior to and after trial, denied Petitioner's motions to strike the prior conviction allegations contained within the information. (CT 98-100; RT 3-9, 259-261.)[4] Petitioner did not challenge his sentence in the trial court on Eighth Amendment grounds. The jury found Petitioner guilty as charged and found the prior conviction allegations to be true. (CT 91-97.) The trial court sentenced Petitioner to 25 years to life in state prison. (CT 102-105)

Petitioner filed a notice of appeal. (CT 106.) The California Court of Appeal affirmed Petitioner's conviction

---

2. All further statutory references are to the California Penal Code unless otherwise specified.

3. "CT" refers to the Clerk's Transcript of Petitioner's trial.

4. "RT" refers to the Reporter's Transcript of Petitioner's trial.



and rejected Petitioner's Eighth Amendment challenge to his sentence. Petitioner then filed a petition for review in the California Supreme Court, in which, inter alia, he asserted that his sentence of twenty-five-years-to-life violated the cruel and unusual punishment provision of the United States Constitution and that, in light of Riggs v. California, 525 U.S. 1114, 119 S. Ct. 890, 142 L. Ed. 2d 789 (1999), the California Supreme Court should grant review. The California Supreme Court denied review on July 12, 2000. On October 10, 2000, Petitioner filed the instant Petition For a Writ of Certiorari with this Court.

## STATEMENT OF FACTS

On January 25, 1999, plainclothes security officers Housden and Urias were working undercover at the Lucky's store in Diamond Bar. (RT 31-32.) Housden observed Petitioner enter the store at approximately 8:20 p.m. Petitioner proceeded directly to the liquor aisle and looked all around suspiciously.

Petitioner selected a bottle of Contreau liquor from the top shelf. He pulled the alarm tag off the bottom of the bottle and dropped it on the floor. Petitioner then concealed the bottle in his left front pants pocket. (RT 37-38.) Petitioner subsequently grabbed a second bottle of Contreau from the shelf. He then pulled the alarm tag off that bottle and concealed the merchandise in his right outside jacket pocket. (RT 38.)

Petitioner next walked to a bin of umbrellas and selected a mini-umbrella from the rack.[5] He secreted the umbrella in his right pants pocket. Petitioner then immediately moved towards the store exit. (RT 39-40.) He passed several open and manned check-out registers without paying for the merchandise. Petitioner then, making no attempt to pay, exited the store in possession of the stolen merchandise. (RT 41.) Agent Urias moved in front of Petitioner approximately five feet outside the entrance and identified himself as store security. Agent Housden stood directly behind Petitioner. (RT 40-42.)

Petitioner pushed Agent Urias with his right hand and attempted to flee the scene. Agent Housden grabbed tne back of Petitioner's jacket and thrust his knee into the rear of Petitioner's knee. Agent Housden pulled Petitioner to the ground to prevent any further escalation of the situation. Petitioner was uncooperative and continued to kick his hands and legs in an attempt to flee. (RT 43, 53, 61.)

The agents finally managed to handcuff Petitioner and brought him back into the store. They removed the stolen merchandise from him and photographed it prior to returning the merchandise to the aisle. (RT 43-45.) Housden asked Petitioner why he had taken merchandise without paying for it. Petitioner said, "I just wanted booze." (RT 46-47.) Deputy Sheriff Pittman responded to Lucky's at approximately 8:30

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5. It had been raining that day. (RT 49.)



p.m. that evening. Housden told Deputy Pittman that Petitioner had been flailing both of his arms during the struggle. (RT 176-177.)

**REASONS CERTIORARI SHOULD BE DENIED**

**THE INSTANT CLAIM IS PREMATURE; THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OR THE STATE SUPREME COURTS; PETITIONER'S SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT**

Petitioner contends his sentence of 25 years to life constituted cruel and unusual punishment in violation of the United States Constitution. Respondent submits Petitioner's sentence did not violate the federal proscription against cruel and unusual punishment.

**A. Background And Relevant Proceedings**

Petitioner's serious criminal history spans well over 20 years[6] and involves at least four serious violent felonies as an adult (two robberies and two attempted robberies in violation of section 211), one additional felony for committing grand theft person in violation of section 487(2), at least one misdemeanor for being under the influence of a controlled substance in violation of California Health and Safety Code section 11550(a), at least one revocation of probation, and at least one parole violation and subsequent return to state prison (apparently for committing robbery on January 8, 1995). (CT 112-114.)

Petitioner spent lengthy periods in jail, prison, on probation, and on parole for the above offenses. Petitioner

6. Respondent notes the probation officer was apparently unable to determine Petitioner's juvenile record. (See CT 112.)



was sentenced to state prison as the result of his four serious violent felony convictions. (CT 112-114.) He was also sent to state prison for 16 months as the result of his grand theft person conviction. (CT 112.) The following chart summarizes these arrests and/or convictions and sentences:[7]

| DATE | CONVICTIONS | SENTENCE |
|---|---|---|
| 1) 10/12/78 | Attempted Robbery (Pen. Code, §§ 664 & 211) | State prison (see RT 142-143) |
| 2) 11/21/80 | Attempted Robbery (Pen. Code, §§ 664 & 211) | State prison (see RT 142-143) 24 months prob.; Prob. revoked |
| 3) 10/23/85 | Robbery (Pen. Code, § 211) | State prison (see RT 142) |
| 4) 8/28/87 | Grand Theft Person (Pen. Code, § 487, subd. (2)) | 16 months state prison |
| 5) 3/20/89 | Robbery (Pen. Code, § 211) | State prison |
| 6) 5/10/94 | Battery On Person (Pen. Code, § 243, subd. (a)) - conviction unknown | No disposition reported (CT 114) |
| 7) 1/8/95 | Robbery (Pen. Code, § 211) - conviction unknown | No disposition reported |
| 8) 1/17/95 | Violation Of Parole | Returned to CDC to finish term |
| 9) 6/16/97 | Under Influence Of Controlled Substance (Health & Saf. Code, § 11550, subd. (a)) | 150 days jail; 3 years probation |

7. The probation report indicates that the listed crimes were only a partial record of Petitioner's criminal conduct. The probation officer noted that a "full" report had been requested. (CT 112.)

Petitioner, prior to trial, asked the trial court to review the constitutional validity of his priors, and to consequently strike the prior conviction allegations contained within the information. (RT 3.) Trial defense counsel subsequently asked the trial court to exercise its discretion to strike three of the prior conviction allegations. See section 1385. (RT 5-8.) The trial court denied the motion and noted,

> This is exactly what the Three Strikes Law was enacted to do. This is what the people wanted to happen to these people like him that continuously break the law on felonies, and he certainly does have that, at least the conviction for serious and violent felonies, several of them.

(RT 6.)[8]

Petitioner, at the sentencing hearing, moved again for the court to strike three of his prior serious felony

---

8. Petitioner claims that his "prior convictions were all relatively minor and all a decade ago or longer." (Pet. at 2.) With all due respect to Petitioner's defense counsel, Petitioner grossly misstates his serious and unending record of violent crime. Indeed, in the instant case, Petitioner battered the store security guard during his violent attempt to avoid arrest. Moreover, Petitioner here, unlike the Riggs defendant, was not merely stealing food or medicine to satisfy hunger. Rather, he attempted to steal alcohol. Additionally, Petitioner apparently committed robbery as recently as 1995, and was found to be in violation of parole for that offense. (CT 112, 114.)

Petitioner also claims that the probation officer in the instant case recommended that the sentence be one year imprisonment. (Pet. at 2.) Petitioner fails to note that the probation officer had been woefully misinformed as to the true nature of Petitioner's lengthy record at the time he made that recommendation. The probation officer specifically noted that "the full extent of his criminal history has yet to be determined." (CT 115-116.) Indeed, had the probation officer been aware of Petitioner's actual criminal record, his recommendation would likely have been much different.



convictions. (RT 250-255.) The trial court denied the motion and noted:

> And the trial court will state, as far as I'm concerned, that this is the type of a case that the People chose in that proposition they passed and adopted by the Legislature, the so-called Three Strikes Law, and it was purposely put in there that he had to have at least two prior serious or violent felonies in order to qualify for a Three Strike trial.
>
> . . . . We have four prior serious or violent felony crimes that he was convicted of, plus the other one that I mentioned was not a violent or serious crime.
>
> So I think that if I struck any of these priors in this case, that I would be reversed by the appellate court or Supreme Court, at least, and I don't feel that I want to do that anyway, because I do feel from the -- I'm not sure that all of those circumstances in aggravation, 421 of the Penal Code apply in this case, but the crime in this case did involve -- was carried out with planning on his part. Before he went to the store he knew what he was going to do.
>
> His prior convictions as an adult are numerous. He has received prior prison terms, and he has been on probation and parole. I think he was on parole when this offense occurred. He has a history of his conduct on parole and probation have not been good.
>
> I don't find any circumstances in mitigation in the case, and so, therefore, I am going to sentence the defendant to the mandatory term of 25 years to life in state prison.

(RT 260-261.)

The California Court of Appeal, in response to Petitioner's instant claim, noted,

> [T]he instant offense involved the theft of alcohol and violent behavior on the part of defendant when he was apprehended by store loss prevention officers.

Id. at 6.

The Court of Appeal also noted,

> In short, defendant has not been sentenced to life in prison merely because he was convicted of petty theft with a prior theft conviction. Rather, he was so sentenced because he is a serious career criminal who has demonstrated repeatedly that he has no intention of abiding by the laws of this State. Defendant's

> sentence is not so disproportionate to his crime that it shocks the conscience and offends fundamental notions of human dignity. Accordingly, this sentence does not violate the prohibition against cruel and unusual punishment.

Id. at 8.

**B. Review Of The Instant Issue By This Court Is Premature**

In Riggs v. California, 119 S. Ct. at 891, Justice Stevens, joined by Justices Ginsburg and Souter, in an opinion respecting the denial of the petition for a writ of certiorari, noted that it would be "prudent for this Court to await review by other courts before addressing the issue." Justice Stevens observed, "Neither the California Supreme Court nor any federal tribunal has yet addressed the question. Id. at 891. In the instant Petition, Petitioner asserts, "Now, almost two years later, it is clear that such review will not be forthcoming. The California Supreme Court repeatedly has denied review of this issue, as it did in this case." (Petition at 11.)

Respondent disagrees. During that two-year period, at least two United States District Courts have ruled on this precise issue. See Wallace v. Castro, 2000 WL 126662 (N.D. Cal. 2000 ["The California Court of Appeal did not err in concluding that petitioner's sentence of 25 years to life for petty theft with a prior and for being a repeat offender with at least two prior serious felony convictions was not unconstitutionally disproportionate."]; Gamble v. Pliler, 2000 WL 126125 (N.D. Cal. 2000) ["Petitioner's sentence of 25 years



to life for petty theft with a prior and for being a repeat offender with at least three prior convictions for serious crimes of violence does not give rise to an inference of gross disproportionality."]. At least two additional decisions during that two-year period have upheld the constitutionality of 25 years to life terms for non-violent felony narcotics offenses committed by recidivists. See Lopez v. Ryan, 2000 WL 709491 (N.D. Cal. 2000); White v. Galaza, 2000 WL 630861 (N.D. Cal. 2000).

Clearly, this issue is working its way through the federal court system and will ultimately be addressed by either the Ninth Circuit Court of Appeals, the California Supreme Court, or both. The lower courts should be given the opportunity to address this issue prior to review by this Court.

Moreover, in Keith C. Russell v. George Galaza, No. 99-15888 the Ninth Circuit requested briefing on whether that petitioner's 26-years-to-life sentence for possession of methamphetamine under California's Three Strikes Law constituted cruel and unusual punishment prohibited by the Eighth Amendment. The case was subsequently dismissed on the motion of that petitioner when he was subsequently resentenced pursuant to state law authority. It is clear that, eventually, the Ninth Circuit will review the instant, or a closely related, contention.

Review of this claim by this Court at the present time, given the current procedural posture of the instant case,

would be premature. For the aforementioned reasons, this Court should decline review until lower courts have had the opportunity to reach this issue.

**C. Sentencing A Career Criminal Recidivist To A Term Of Twenty-Five-Years-To-Life For The Felony Crime Of Petty Theft With A Prior Does Not Constitute Cruel And Unusual Punishment**

Under Eighth Amendment analysis, disproportionality has little or no relevance in non-capital cases. Harmelin v. Michigan, 501 U.S. 957, 965, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991); Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). In Harmelin, this Court upheld a mandatory sentence of life without possibility of parole, imposed by a Michigan state court for possession of 672 grams of cocaine. A majority of Justices concurred in holding the sentence did not violate the Eighth Amendment, despite allegations of gross disproportionality. (Harmelin v. Michigan, 501 U.S. at 962-94 (Scalia, J., joined by Rehnquist, C.J.), 997-1003 (Kennedy, J., joined by O'Connor, J., and Souter, J.).)

In Harmelin, the opinion noted this Court's prior refusal to overturn the life sentence of a recidivist who had committed three non-violent crimes -- a credit card fraud amounting to $80, the forgery of an $80 check, and obtaining $120 under false pretenses.[9] Ibid., citing Rummel v.

9. The California Court of Appeal succinctly addressed the opinions of the majority of this Court's justices in Harmelin in its opinion (page 7 at note 3) affirming the



Estelle, 445 U.S. at 263. The Rummel opinion specifically addresses anti-recidivism statutes and therefore has great significance to the instant case. In upholding the controverted statute in Rummel, this Court noted that state statutory schemes providing increased punishment for recidivists regularly survive Eighth Amendment challenge. Rummel v. Estelle, 445 U.S. at 268, citing Spencer v. Texas, 385 U.S. 554, 560, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967).

As persuasive authority, Respondent directs this Court to the opinions of several appellate districts in the California Court of Appeal which have directly addressed and rejected Petitioner's claim. See, e.g., People v. Cooper, 43 Cal. App. 4th 815, 820-823, 51 Cal. Rptr. 2d 106 (1996);

instant matter. It noted,

> Justice Scalia, joined by Chief Justice Rehnquist, concluded [Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)] was wrongly decided and that the Eighth Amendment does not guarantee proportionality of sentences. (Id. at p. 965.) Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the Eighth Amendment prohibits only sentences which are "grossly disproportionate" to the crime. (Id. at p. 1001.) These three justices concluded that consideration of the second [sentence imposed on other criminals in same jurisdiction] and third [sentence imposed for commission of same crime in other jurisdictions] Solem factors is necessary only when the first factor [gravity of offense and harshness of penalty] suggests the sentence may be grossly disproportionate. When the first factor shows the sentence is constitutional, the analysis is complete. (Id. at p. 1005.) Since three justices would uphold a sentence satisfying the first factor, and two justices would uphold a sentence against any proportionality challenge, it is clear that a majority of the Supreme Court would agree that a sentence is constitutional if it does not appear to be grossly disproportionate based on an analysis of the gravity of the offense and harshness of the penalty alone.

People v. Cartwright, 39 Cal. App. 4th 1123, 1135, 46 Cal. Rptr. 2d 351 (1995). Division Four of California's Second Appellate District, following Rummel, has held extended sentences for repeat offenders do not violate the federal constitutional proscription against cruel and unusual punishment, thereby affirming the imposition of two five-year recidivism enhancements under California Penal Code section 667, subdivision (a). People v. Lopez, 147 Cal. App. 3d 162, 164, 195 Cal. Rptr. 27 (1983). In a similar case, Division Three of California's First Appellate District held the increased penalties mandated by section 667, subdivision (a) are a proper exercise of legislative prerogative. People v. Weaver, 161 Cal. App. 3d 119, 125-28, 207 Cal. Rptr. 419 (1984). As previously noted, at least two federal district courts have agreed with the California courts of appeal regarding this precise issue. See Lopez v. Ryan, 2000 WL 709491 (N.D. Cal. 2000); White v. Galaza, 2000 WL 630861 (N.D. Cal. 2000).

Nonetheless, Petitioner argues his sentence, based largely on prior serious felony convictions, is grossly disproportionate to his crimes. (Pet. at 3-5.) Petitioner errs in viewing the instant offenses in isolation. The trial judge in this case carried out the express intent of the California Legislature, punishing Petitioner not merely for



his current felonies but for his endless recidivism.[10] Cooper, 43 Cal. App. 4th at 823-25.

Petitioner served extensive time in prison, on parole, and on probation for the aforementioned convictions. (CT 112-114.) Nothing has deterred him from continuing his life of crime. The trial court specifically noted,

> And the trial court will state, as far as I'm concerned, that this is the type of a case that the people chose in that proposition they passed and adopted by the Legislature, the so-called Three Strikes Law, and it was purposely put in there that he had to have at least two prior serious or violent felonies in order to qualify for a Three Strike trial.

(RT 259.)

Therefore, Petitioner's Eighth Amendment challenge concerning the alleged gross disproportionality of his sentence must be rejected. Petitioner, as demonstrated by his prior criminal record and the instant offense, represents a dangerous menace to the people of California. His record of violent criminal behavior stretching back through his entire adulthood warranted a significant period of incarceration.

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10. Petitioner relies on Apprendi v. New Jersey, 120 S. Ct. 2348, 2357 n.7, 147 L. Ed. 2d 435 (2000), for the proposition that the "common law punishment for misdemeanors -- those smaller faults, and omissions of less consequence" did not include prison sentences." Petitioner fails to note that, in those times, "judges most commonly imposed discretionary 'sentences' of fines or whippings upon misdemeanant offenders." (Id. at 2357 n.7.) Petitioner also relies on Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977). Coker is easily distinguished as it is a capital case which found a sentence of death for the rape of an adult woman to be grossly disproportionate. Finally, Petitioner relies on United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). Bajakajian is easily distinguished as it involved a constitutional inquiry under the Excessive Fines Clause.

All prior attempts at rehabilitation and deterrence have met with abject failure. Petitioner's sentence was properly based on his recidivist behavior and lack of regard for rehabilitation. Petitioner has demonstrated nothing but contempt for the criminal justice system. Petitioner apparently was also on parole or probation at the time of the present offense. (RT 261.)

Petitioner's sentence likewise compares almost identically to those of other jurisdictions involving anti-recidivism statutes.[11] For example, in Alabama, a defendant with two prior felony convictions faces mandatory sentences

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11. Recidivist statutes currently exist in Alabama (Ala. Code, § 13A-5-9), Arizona (Ariz. Rev. Stat. Ann., § 13-604), Arkansas (Ark. Code Ann., § 5-4-501), Colorado (Colo. Rev. Stat., § 16-13-101), Connecticut (Conn. Gen. Stat. Ann., § 53a-40), Delaware (Del. Code Ann., tit. 11, § 4214), Florida (Fla. Stat. Ann., § 775.084), Georgia (Ga. Code Ann., § 17-10-7), Hawaii (Haw. Rev. Stat., § 706-606.5), Idaho (Idaho Code, § 19-2514), Illinois (Ill. Ann. Stat., ch. 720, § 33B-1), Indiana (Ind. Code, § 35-50-2-8.5), Kansas (Kan. Stat. Ann., § 21-4504), Kentucky (Ky. Rev. Stat. Ann., § 532.080), Louisiana (La. Rev. Stat. Ann., § 15:529.1), Maryland (Md. Ann. Code, art. 27, § 643B), Michigan (Mich. Comp. Laws Ann., § 769.12), Mississippi (Miss. Code Ann., § 99-19-83), Missouri (Mo. Ann. Stat., § 558.016), Montana (Mont. Code Ann., § 46-18-501), Nebraska (Neb. Rev. Stat., § 29-2221), Nevada (Nev. Rev. Stat., § 207.010), New Hampshire (N.H. Stat. Ann., § 651:6), New Jersey (N.J. Stat. Ann., § 2C:44-3, 2C:43-7), New York (N.Y. Penal Law, § 70.08), North Carolina (N.C. Gen. Stat., § 14-7.1, 14-7.6), North Dakota (N.D. Cent. Code, § 12.1-32-09), Oklahoma (Okla. Stat., tit. 21, § 51), Oregon (Ore. Rev. Stat., § 161.725), Rhode Island (R.I. Gen. Laws, § 12-19-21), South Carolina (S.C. Code Ann., § 17-25-45), South Dakota (S.D. Codified Laws, § 22-7-8), Tennessee (Tenn. Code Ann., § 40-35-106, 40-35-107, 40-35-108), Texas (Tex. Penal Code Ann., § 12.42), Utah (Utah Code, § 76-8-1001), Vermont (Vt. Stat. Ann., tit. 13, § 11), Virginia (Va. Code Ann., § 19.2-297.1), Washington (Wash. Rev. Code Ann., § 9.92.090), West Virginia (W. Va. Code, § 61-11-18) and Wyoming (Wyo. Stat., § 6-10-201).



ranging from 10 years to life, depending upon the class of the third felony conviction. (Ala. Code, §§ 13A-5-6, 13A-5-9.) Delaware imposes life sentences on defendants thrice convicted of certain named felonies. (Del. Code Ann., tit. 11, § 4214.) Accordingly, Petitioner's sentence appears wholly appropriate.[12]

Petitioner also claims that it is grossly disproportionate to treat misdemeanor conduct as a felony because of prior offenses and then to use that enhanced misdemeanor as a third felony strike that is the basis for imposing a sentence of 25 years to life in prison. (Pet. at

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12. Petitioner claims that "there is currently a disagreement among the state courts as to whether it violates the Eighth Amendment to impose a life sentence in these circumstances." (Pet. at 13.) However, Petitioner is only able to cite one case from the Colorado Court of Appeals, People v. Gaskins, 923 P.2d 292 (Colo. App. 1996), as authority for his novel proposition. Gaskins is easily distinguished, as, initially, it is a decision of the Colorado Court of Appeals, not the Colorado Supreme Court. In any event, Colorado apparently has a complicated "big" and "little" habitual sentencing scheme, which appears to be much different from California's Three Strikes Law. (Id. at 297-98.) Moreover, one of the triggering offenses in Gaskins was a "Class 5 felony," a lesser felony in Colorado, and defendant Gaskins' criminal history pales in comparison to Petitioner's extensive and violent felony record. (Id. at 295-296.)

8-9.)[13] Petitioner again ignores Justice Stevens language in Riggs v. California,

> Given the fact that a defendant's prior criminal record may play a dual role in the enhancement scheme - first converting the misdemeanor into a felony, and then invoking the provisions of the three-strikes law - there is some uncertainty about how our cases dealing with the punishment of recidivists should apply. We have of course held that "a State is justified in punishing a recidivist more severely than it punished a first time offender." [Citation.] But in order to avoid double jeopardy concerns, we have repeatedly emphasized that under recidivist sentencing schemes "the enhanced punishment imposed for the [present] offense 'is not to be viewed as . . . [an] additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'"

(Id. at 891.)

In Rummel v. Estelle, this Court noted,

> [The] primary goals [of a recidivist statute] are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted and sentenced for other crimes.

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13. Petitioner failed to present this argument to either the trial court, the California Court of Appeal, or the California Supreme Court. This Court should not review this issue given Petitioner's failure to raise it below. Likewise, in the instant Petition, Petitioner claims that "because of different attitudes of local district attorneys, the Three Strikes Law is applied in Los Angeles and Sacramento counties seven times more often that in Alameda and San Francisco counties." Petitioner never presented this argument to any court below and now presents it to this Court for the first time on appeal. This Court should not consider these arguments given Petitioner's failure to raise them below. (See Rules of the Supreme Court of the United States, rules 10 & 12.)



(445 U.S. at 284.)

Petitioner's sentence reflects Petitioner's own failure to conform his behavior and abide by the laws of the State of California. Petitioner has been given countless opportunities to end his unremittingly life of crime. His sentence is just and well-deserved. Petitioner's sentence does not violate the bar against cruel and unusual punishment under the United States Constitution.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Petition For a Writ of Certiorari.

Dated: December 18, 2000.

Respectfully submitted,

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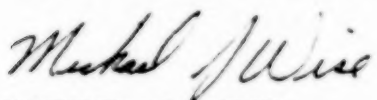

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# CORRECTED



## SUPREME COURT OF THE UNITED STATES

STANLEY DURDEN *v.* CALIFORNIA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 00–6479. Decided February 20, 2001

The petition for a writ of certiorari is denied.

JUSTICE SOUTER, with whom JUSTICE BREYER joins, dissenting from the denial of the petition for a writ of certiorari.

Two terms ago this Court denied certiorari in *Riggs* v. *California*, 525 U. S. 1114 (1999). The issue was an Eighth Amendment challenge to California's statutory scheme that allows a petty theft (normally a misdemeanor) to be counted as a third felony for purposes of a three-strikes law, resulting in a sentence of 25 years to life. *Id.*, at 1115. This case raises the same issue; the value of the goods taken was $43. Pet. for Cert. 8.

JUSTICE BREYER dissented from the denial of certiorari in *Riggs*, while JUSTICE STEVENS filed an opinion respecting the denial, in which JUSTICE GINSBURG and I joined. A principal reason that the three of us were led to concur in the denial of review was the expectation that rulings by other courts on challenges to the California scheme would be valuable to us in any examination of the issue we might ultimately give it. I no longer think this a sufficient reason to postpone what I assume will inevitably be a decision at some point to examine the matter.

Two years after *Riggs*, the Supreme Court of California has not taken up the issue, and petitioner (like Riggs) seeks review of an intermediate appellate court decision. We are advised that Federal District Courts have uniformly denied relief to California petitioners like this one. See *Wallace* v. *Castro*, No. C 99–2270 CRB (PR), 2000 WL

1262662 (ND Cal., Aug. 30, 2000); *Gamble* v. *Pliler*, No. C 99–2133 WHA (PR), 2000 WL 126125 (ND Cal., Jan. 31, 2000). While it is not apparent (save in one instance) why the Ninth Circuit has not considered the issue, my inclination to wait until it has done so is checked by two considerations: the potential for disagreement over application of the habeas corpus review standards of *Teague* v. *Lane*, 489 U. S. 288 (1989), and the Antiterrorism and Effective Death Penalty Act of 1996, were we to take up this question in the federal habeas context; and the uncontroverted representation of petitioner's counsel that some 319 California prisoners are now serving sentences of 25 years to life for what would otherwise be misdemeanor theft under the California scheme.

On these facts, I would wait no longer. The issue is serious, the state courts have had adequate opportunity to consider it, and the stakes are substantial. I respectfully dissent from denial of the petition for certiorari.